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## Unilateral Measures and WTO Dispute Settlement: An EC Perspective

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This article explores the issue of unilateral measures in the field of international trade. The analysis focuses on the European Community (EC) Regulation adopted to counteract the delayed US compliance with the Dispute Settlement Body (DSB) recommendations in *United States—1916 Anti-Dumping Act*. The Regulation is set within its context and its legality is examined under EC and World Trade Organization (WTO) law. The Regulation violates EC law with regard to the legal basis chosen, the content and context for its adoption. More controversially, it is submitted that the Regulation violates WTO rules and in particular those enshrined in the Dispute Settlement Understanding (DSU). Premised on these findings, the article concludes that both EC and WTO law limit the EC's discretion at the adoption of unilateral measures in the field of international trade and furnishes support to the general statement that, in its proper construction, the DSU precludes WTO Members from taking unilateral measures in their international trade relations.

### I. INTRODUCTION

States adopt autonomous measures in the field of trade in order to further their objectives and protect their interests on the international plane. Those measures predate the creation of the WTO but it has been the establishment and operation of the latter that has put States' autonomous measures under close scrutiny. The central position multilateralism occupies in the world trading ethos necessitates the compliance of autonomous measures with the WTO Agreement.

This is particularly so in the context of dispute resolution. A WTO Member, once availing itself of the provisions of the Dispute Settlement Understanding (DSU) to resolve a dispute with another WTO Member, undertakes to follow the DSU procedures. Once the DSU procedure is triggered recourse to unilateralism is ruled out. This flows from the spirit of the provisions of the DSU which establishes the Dispute Settlement Body (DSB), comprising the entire WTO membership, to administer the DSU and rubberstamp every step of the process with its authority.<sup>1</sup> In

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<sup>1</sup> Article 2.1 DSU.

addition to the strict and detailed procedures enshrined in the DSU,<sup>2</sup> Article 23 DSU explicitly advocates the multilateral character of the system and emphasizes the strict adherence to the provisions of the DSU. The question thus raised is whether WTO Members have lost all discretion in the manner in which they may protect their interests when they seek to redress a violation under the WTO Agreement.

While the DSU, not immune from gaps and inefficiencies, could be interpreted to provide a complete set of rules, the two major trading powers in the WTO, namely the United States and the European Community (EC), have on several occasions stretched the interpretative boundaries of the DSU provisions and took, or threatened to take, a deviant path away from the DSU framework.<sup>3</sup> Focusing on the EC, autonomous measures of a unilateral character are gradually establishing themselves as essential arrows within the Union's trade quiver so much so that recent practice demonstrates an inclination to adopt measures of self-help either in parallel to a WTO dispute so as to coerce compliance and limit damages pending the resolution of the dispute in the WTO<sup>4</sup> or even in lieu of a WTO dispute.<sup>5</sup>

The remark made above instigates a broad discussion over the relationship between autonomous measures and international dispute settlement and in particular, the past, present and future of WTO dispute settlement. The repercussions to the relationship will be evinced in the analysis of a case where autonomous measures have been adopted by the EC. The case at issue concerns the *US—1916 Anti-Dumping Act* and the measures taken by the EC in order to respond to the non-compliance by the United States with the unfavourable DSB recommendations by repealing the Anti-Dumping Act of 1916 (the Act).<sup>6</sup> Having exhausted all stages of the WTO dispute settlement system since the EC requested consultations in June 1998 and faced with delays in compliance by the United States, the Council adopted Regulation 2238/2003

<sup>2</sup> The operation of the procedure in particular in relation to compliance and retaliation has attracted the attention of commentators: D. Palmeter and P.C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge: Cambridge University Press, 2004), pp. 227–233 and 295–299; N. Lavranos, *Some Proposals for a Fundamental DSU Reform*, 29 *Legal Issues of Economic Integration* (2002), p. 73; P.C. Mavroidis, *Proposals For Reform of Article 22 of the DSU: Reconsidering the “Sequencing” Issue and Suspension of Concessions*, 18 *Studies in Transnational Economic Law* 2004), p. 61; E.-U. Petersmann, *Additional Negotiation Proposals on Improvements and Clarifications of the DSU*, 18 *Studies in Transnational Economic Law* (2004), p. 91; D. McRae, *What is the Future of WTO Dispute Settlement?*, 7 *Journal of International Economic Law* (2004), p. 3.

<sup>3</sup> USTR press release, 3 March 1999, *United States takes customs action on European imports* (unauthorized retaliation in the EC—Bananas – WT/DS165: *United States—Import measures on certain products from the European Communities*); Section 407 US Trade and Development Act of 2000 (adoption by the US of “carousel” legislation); Council Regulation 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon resulting therefrom, O.J. L309, 29.11.1996, p. 1 (EC response to the Helms-Burton Act – WT/DS38 *United States—The Cuban Liberty and Democratic Solidarity Act*).

<sup>4</sup> Council Regulation 1177/2002 of 27 June 2002 concerning a temporary defence mechanism to shipbuilding, O.J. L172, 2.7.2002, p. 1 (EC response to Korean subsidies to shipbuilding: WT/DS273 *Korea—Measures affecting trade in commercial vessels*).

<sup>5</sup> Regulation 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidization and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community, O.J. L162, 30.4.2004, p. 1 (no case has been brought in the WTO yet).

<sup>6</sup> Title VIII of the Revenue Act of 1916.

(the Regulation).<sup>7</sup> The Regulation is an autonomous measure adopted following the internal EC procedure. The DSB granted no authorization for this measure, nor has any authorization been requested. In this sense, the Regulation represents a unilateral measure taken in the margin of an ongoing WTO dispute. In the analysis that follows its legality shall be assessed in the light of the overlapping frameworks established by the EC and WTO legal orders.

## II. THE US—1916 *ANTI-DUMPING ACT* DISPUTE

The 1916 Anti-Dumping Act, which forms the subject-matter of the EC's complaint, provided that:

“It shall be unlawful . . . to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles . . . : Provided, that such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States. Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanour, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court. Any person . . . may sue . . . and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.”<sup>8</sup>

The EC considered that these provisions were incompatible with WTO law,<sup>9</sup> and on 4 June 1998, the EC requested consultations with the United States in respect of the latter's alleged failure to repeal the Act.<sup>10</sup> At the EC's request a Panel was established by the DSB on 1 February 1999. In its report, circulated to Members on 31 March 2000, the Panel considered that the Act violated Articles VI:1 and VI:2 GATT 1994, Articles 1, 4 and 5.5 Anti-Dumping Agreement and Article XVI:4 WTO Agreement. On the appeal by the United States, the Appellate Body upheld all findings and conclusions of the Panel that were appealed.<sup>11</sup>

After the adoption of the Appellate Body report and the Panel report by the DSB, the United States stated that it intended to implement the DSB recommendations, it would however require a reasonable period of time for implementation and would consult with the EC and Japan on this matter. The resulting arbitration pursuant to Article 21.3(c) DSU set the reasonable period of time in this case at 10 months, expiring on 26 July 2001, but was extended by the DSB until 31 December 2001 or the end of the US Congress session, whichever

<sup>7</sup> Council Regulation 2238/2003 of 15 December 2003 protecting against the effects of the application of the United States Anti-Dumping Act of 1916, and actions based thereon or resulting therefrom, O.J. L333, 20.12.2003, p. 1.

<sup>8</sup> WT/DS136/R *United States—Anti-Dumping Act of 1916*, Panel Report, para. 2.1.

<sup>9</sup> Articles III:4, VI:1, and VI:2 GATT 1994, Article XVI:4 of the WTO Agreement, and Articles 1, 2, 3, 4 and 5 of the Anti-Dumping Agreement.

<sup>10</sup> Japan also brought a complaint against the Act several months after the EC (WT/DS162).

<sup>11</sup> WT/DS136/AB/R *United States—Anti-Dumping Act of 1916*, Appellate Body Report, para. 155.

earlier. On 7 January 2002, on the grounds that the United States had failed to bring its measures into conformity within the reasonable period of time, the EC and Japan requested authorization to suspend concessions pursuant to Article 22.2 DSU. Both Members proposed that the suspension of concessions takes the form of an equivalent legislation to the Act against imports from the United States. The United States objected to the levels of suspension of obligations proposed by the EC and Japan and the matter was referred to arbitration, in accordance with Article 22.6 DSU, which was suspended during the parties' efforts to find a mutually satisfactory solution.

Faced with the repeated foot-dragging by the United States to pass legislation that would repeal the Act with retroactive effect and would apply to all cases pending in US courts at the time against EC and Japanese exporters, the EC and Japan noted that proceedings against some of their companies were about to resume and that it was imperative for swift action to be taken by the United States to prevent the EC and Japanese companies from incurring substantial expenses in order to defend themselves under legislation which had been found to be inconsistent with WTO rules.<sup>12</sup> Given that no such legislation had been adopted, on 19 September 2003 the EC requested the arbitrators to reactivate the arbitration proceeding. The decision by the arbitrators was circulated to Members on 24 February 2004. In light of the fact that the nullification or impairment results from the Act "as such", and not from particular instances of application of that law, the arbitrators decided to set a number of parameters ((i) the damages paid by EC companies as a result of judgments under the 1916 Act and (ii) the amount of any settlement reached between an EC company and a US complainant pursuant to the Act) with which the EC will have to comply when calculating by itself the amount of countermeasures it plans to impose, rather than setting a fixed value of trade which the EC should not exceed when suspending its WTO obligations against the United States.<sup>13</sup> On 3 December 2004, before any retaliatory measures were taken by the EC and Japan, a provision repealing the Act—with prospective effect—was signed into law by President Bush.<sup>14</sup>

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<sup>12</sup> See M. Matsushita and A. Iino, *The Blocking Legislation as a Countermeasure to the US Anti-Dumping Act of 1916: A Comparative Analysis of the EC and Japanese Damage Recovery Legislation*, 40 *Journal of World Trade* (2006), p. 754.

<sup>13</sup> WT/DS136/ARB, *US—1916 Anti-Dumping Act of 1916 (Recourse to Arbitration by the United States under Article 22.6 of the DSU)*, Decision by the Arbitrators, 24 February 2004, para. 2.1. The *US—1916 Anti-Dumping Act* case generated a novelty regarding the nature of retaliation requested by the Community. Instead of requesting suspension of concessions, which has been the practice so far, the EC requested authorization to suspend the application of other obligations, namely Article VI GATT and the AD Agreement so that it is enabled to adopt an anti-dumping regulation mirroring the Act to apply to dumped products originating in the United States.

<sup>14</sup> Section 2006 of the Miscellaneous Trade and Technical Corrections Act 2004.

### III. THE REGULATION

It could be argued on the basis of the chronological account analysed above that, despite any delays and shortcomings, the resolution of this dispute constitutes a triumph of multilateralism and of the WTO Dispute Settlement system in particular. This proposition could not be further from the truth. Faced with the protracted unwillingness of the United States to conform to the rulings of the Panel and Appellate Body by repealing the Act or amending the WTO-inconsistent provisions thereof and despite the forthcoming authorization for countermeasures in the form of WTO-inconsistent anti-dumping legislation by the DSB, an additional line of defence was devised by the EC. Two months after it had reactivated the Article 22.6 arbitration and while arbitration was still pending, the EC considered that it would be more efficient to take additional measures against American industries involved in the American disputes against the European companies. Acting on the basis of Article 133 EC Treaty (Common Commercial Policy), the Council adopted the Regulation under scrutiny in this study.<sup>15</sup> The objectives of the Regulation, enshrined in its preamble, are to coerce the United States of America to repeal the Act whose maintenance and application impedes the harmonious development of world trade,<sup>16</sup> to protect persons under the jurisdiction of the Member States against whom claims under the Act are pending before US Courts which are causing substantial litigation costs and may ultimately result in a judgment awarding treble damages,<sup>17</sup> to protect the established legal order and the interests of the Community and of natural or legal persons exercising rights under the Treaty,<sup>18</sup> and, under these exceptional circumstances, to do so by removing, neutralizing, blocking or otherwise counteracting the effects of the Act.<sup>19</sup>

In order to achieve these objectives two measures are promulgated in the Regulation: a negative (“the blocking provision”) and a positive measure (“the clawback provision”). The blocking provision prohibits the recognition and enforcement of judgments and decisions by administrative or judicial authorities rendered in the United States giving effect to the Act.<sup>20</sup> The clawback provision grants the affected EC industries the right to recover any outlays, costs, damages and miscellaneous expenses as a result of the application of the Act.<sup>21</sup> Recovery may be obtained from any person or entity that brought the claim under the Act.<sup>22</sup> Recovery may take the form of seizure and sale of assets held by the defendant, including shares in a legal person incorporated in the EC.<sup>23</sup>

<sup>15</sup> Council Regulation 2238/2003 of 15 December 2003 protecting against the effects of the application of the United States Anti-Dumping Act of 1916, and actions based thereon or resulting therefrom, O.J. L333, 20.12.2003, p. 1.

<sup>16</sup> Recital (8) read *in juncto* with recital (1).

<sup>17</sup> Recitals (6) and (7).

<sup>18</sup> Recital (8).

<sup>19</sup> Recital (9).

<sup>20</sup> Article 1 of the Regulation.

<sup>21</sup> Article 2(1) of the Regulation.

<sup>22</sup> Article 2(3) of the Regulation.

<sup>23</sup> Article 2(4) of the Regulation.

It is not the first time that such measures have been taken in international relations.<sup>24</sup> The origin of the blocking provision can be traced in the US anti-boycott regulations adopted in response to the Arab boycott of Israel. The US anti-boycott regulations however did not contain any clawback provisions for the compensation of those firms penalized by the boycotting countries.<sup>25</sup> The first instance the clawback provision has been noted was the UK Protection of Trading Interests Act of 1980.<sup>26</sup> The UK Act had been adopted so as to counteract the multiple damages awarded by US Courts in antitrust cases and provide for the recovery of the damages actually suffered.<sup>27</sup> In the EC legal framework, the first attempt to adopt such a legal instrument took place in 1982 when the US government prohibited the EC to use US technology at the construction of the Siberian gas pipeline. The EC then made a formal “démarche” complaining against the United States but no countermeasures were taken at an EC level.<sup>28</sup>

The first successful use of these provisions by the EC took place in 1996, when, in the course of another WTO dispute, the Helms-Burton Regulation was adopted<sup>29</sup> in order to counteract the effects of the notorious Helms-Burton Act.<sup>30</sup> The Helms-Burton Regulation’s provisions are essentially reproduced by the 2003 Regulation.<sup>31</sup> It should be mentioned here that the EC was not alone in adopting measures as Canada and Mexico had also put similar legislation in place for the same reason.<sup>32</sup> It should be admitted however, that neither the EC nor any other party attracted serious criticism for the adopted measures owing to the furore caused by the adoption of the extraterritorial measures by the United States, which, in the opinion of commentators, were also fundamentally misguided on a political level.<sup>33</sup> In addition, the Regulation was hardly put to the test due to the continuous suspension of the application of the Helms-Burton Act.<sup>34</sup>

Having been adopted in the context of an ongoing WTO dispute, having Article 133 EC as its legal basis and having the content analysed above, the Regulation raises several questions which go further than the discourse on multilateralism within the legal framework established by the WTO. In fact, the first question to be asked is

<sup>24</sup> A.H. Qureshi, *International Economic Law* (London: Sweet & Maxwell, 1999), pp. 78–79.

<sup>25</sup> K. Martin, *Legislative Developments: Anti-boycott measures*, 3 Columbia Journal of European Law (1997), pp. 322–323.

<sup>26</sup> Article 6 of the 1980 Protection of Trading Interests Act.

<sup>27</sup> V. Lowe, *US Extraterritorial Jurisdiction: The Helms-Burton and D’Amato Acts*, 47 International and Comparative Law Quarterly (1997), p. 388.

<sup>28</sup> J. Bourgeois, “The Common Commercial Policy – Scope and Nature of the Powers”, in E.L.M. Völker (ed.), *Protectionism and the European Community* (Deventer: Kluwer, 1987), p. 12, footnote 32.

<sup>29</sup> Council Regulation 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon resulting therefrom, OJ. L309 29.11.1996, p. 1.

<sup>30</sup> The Cuban Liberty and Democratic Solidarity Act (LIBERTAD).

<sup>31</sup> Article 1 of the Regulation reproduces Article 4 of the Helms-Burton Regulation, Article 2 reproduces Article 6 and Article 3 reproduces Article 11.

<sup>32</sup> D.H. Forsythe, *Canada: Foreign Extraterritorial Measures Act incorporating the amendments countering the US Helms-Burton Act*, 36 International Legal Materials (1997), p. 111.

<sup>33</sup> Lowe, as note 27 above, at p. 385.

<sup>34</sup> E. Vermulst and B. Driessen, *The Choice of a Switch: The European Reaction to the Helms-Burton Act*, 11 Leiden Journal of International Law (1998), p. 86.

whether the Regulation is consistent with EC law. The answer is dependent on the choice of Article 133 as the legal basis for its adoption, the Regulation's content and the context within which the measures enshrined in the Regulation were adopted, namely the Trade Barriers Regulation (TBR).<sup>35</sup> The second question is the conformity of the Regulation with WTO law, in particular the provisions of the DSU. The analysis of the conformity of the Regulation with WTO law, apart from its standalone merit, affects the answer to the question of legality in EC law since the TBR explicitly sets the multilateral trading rules, and in particular those of the WTO, as the EC's normative benchmark. As a consequence, the Regulation's legality in EC law shall also be affected by the conclusion drawn regarding its legality under WTO law.

#### IV. ANALYSIS OF THE REGULATION'S LEGALITY IN EC LAW

##### A. LEGAL BASIS

The Regulation is based on Article 133 EC Treaty, which contains the rules for the exercise by the EC of its Common Commercial Policy (CCP) and represents the basic source of authority for the EC to conduct its external trade relations. As such it represents the mechanism that enables the EC to assert its rights on the international trading plane and, most notably, participate in the WTO dispute settlement system. The first question to be answered therefore is whether the Regulation is validly based on Article 133. The answer forms part of broader considerations on the nature and scope of the CCP and the measures that can be taken in its application. Conflicting considerations include the Columbus egg dilemma which ponders over whether a measure taken in the course of an ongoing WTO dispute is a commercial policy measure its content regardless or whether the content of the measure will determine its nature as a commercial policy measure. The CCP can be implemented by both the conclusion of international agreements and the adoption of autonomous measures and Article 133 can form the legal basis for both.<sup>36</sup> While contractual and autonomous Commercial Policy run in parallel, a gradual deviation from the principle of parallelism has been noted since the Treaty of Amsterdam amendments. While the scope of the CCP was extended to cover negotiation and conclusion of international agreements on services and IP, the adoption of internal measures on the same subject-matter was still based on the appropriate internal legal bases.<sup>37</sup>

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<sup>35</sup> Council Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, O.J. L349, 31.12.1994, p. 71.

<sup>36</sup> Opinion 1/75 (*Re OECD Local Cost Standard*) [1975] ECR 1355 at p. 1363.

<sup>37</sup> M. Cremona, "External Economic Relations and the Amsterdam Treaty", in D. O'Keeffe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart Publishing, 1999), p. 225. Also, Case C-281/01 *Commission v. Council (Re Energy Star Agreement)* [2002] ECR I-12049 at para. 46.



The Commission had important reasons for choosing Article 133 as the legal basis: First, the effectiveness of EC action at the handling of the *US—1916 Anti-Dumping Act* dispute is a fundamental consideration. Effectiveness could be facilitated if the EC's response to the US unwillingness to comply with the DSB recommendations was handled by the same people and procedures and, more importantly, under exclusive EC competence, under qualified majority and without the involvement of the European Parliament. Second, closely linked to effectiveness is the uniformity between external and internal action, which in the case of the CCP flows directly from the text of the Treaty. Both the principle of parallelism and the principle of exclusivity intend to safeguard uniformity and armour the Single Market. This will be achieved if the EC acts internally and externally with regard to the same subject-matter following the same institutional procedures.

However, both effectiveness and uniformity as grounds for resort to Article 133 should be examined against the historical evolution of the CCP. Constitutionally, the Union has made strides since the 1970s. The narrow scope of the EC Treaty coupled with the broad interpretation of Article 133 by the Court of Justice in the 1970s afforded the perception of Article 133 as a broad and all-encompassing legal basis for external economic activity.<sup>38</sup> Since then, the failure of the Commission to achieve a formal recognition of this in the successive Treaty amendments *in juncto* with the broadening of the scope of the Treaties that those amendments brought rendered Article 133 EC untenable as a general external relations legal basis. The Constitutional Treaty seems to change little in this process except for the fact that the CCP is granted a broader scope and competence conferred on the Union is exclusive to for all aspects of trade including services, IP and investment.<sup>39</sup> It has been pointed out by commentators that in the light of the development of the case law and the constitution of the Union, uniformity is not critical for the effective operation of the internal market.<sup>40</sup>

The question on the scope of the CCP in the case-law was primarily concerned with the scope of Article 133 for the purposes of the conclusion of international agreements.<sup>41</sup> The case at issue presents a major novelty: it deals not with the conclusion of an international agreement but the adoption of internal measures. In this sense, it is not the breadth of the CCP, namely whether it covers trade in services and IP as seen in the debate of the 1990s, but rather its depth with particular focus on the nature of the measures which can be taken under the CCP. Based on Article 133(1), the adoption of commercial defence measures, such as the imposition of anti-dumping

<sup>38</sup> Opinion 1/75 (*Re OECD Local Cost Standard*) [1975] ECR 1355.

<sup>39</sup> A. Antoniadis, "The participation of the European Community in the World Trade Organisation: An External Look at European Union Constitution-Building", in T. Tridimas and P. Nebbia (eds), *European Union Law for the Twenty-first Century: Rethinking the New Legal Order*, Vol. 1 (Oxford and Portland: Hart Publishing, 2004), p. 321.

<sup>40</sup> M. Cremona, *A Policy of Bits and Pieces? The Common Commercial Policy After Nice*, 4 Cambridge Yearbook of European Legal Studies (2001), p. 61; P. Koutrakos, *The elusive quest for uniformity in EC external relations*, 4 Cambridge Yearbook of European Legal Studies (2001), p. 243.

<sup>41</sup> Opinion 1/94, (*Re WTO*) [1994] ECR I-5267; Opinion 2/00, (*Re Cartagena Protocol*) [2001] ECR I-9713.

and countervailing duties, has been uncontroversial. The provisions of the Regulation, however, necessitate a broader discussion.

In this respect, the European Court of Justice has been persistent in its case-law that the “legal basis shall be adopted on the basis of objective factors amenable to judicial review”.<sup>42</sup> With regard to the CCP, the Court has consistently held that the EC institutions enjoy a margin of discretion in their choice of the means needed to achieve the common commercial policy.<sup>43</sup> In 1987, analysing the instruments of CCP, Bourgeois wrote:

“Import duties, surveillance, anti-dumping and countervailing duties, and quantitative restrictions imposed as protective measures may not always be appropriate or even possible. To further the common commercial policy interest, other actions and measures may be necessary. Legislation should be adopted under Article 113 [new Article 133], e.g. to protect the commercial policy interests against boycott and against other actions by third countries, or act against trade in counterfeit goods.”<sup>44</sup>

This proposition is reflected in the Commission’s reasoning favouring the adoption of the Regulation on the basis of Article 133.

Article 133 can be justified as the legal basis if the Regulation is classified as an unfair trade instrument.<sup>45</sup> Article 133’s reference to “measures to protect trade such as those to be taken in the event of dumping or subsidies” permits an interpretation which extends the choice of commercial defence instruments not only to the traditional anti-dumping and countervailing duties but also to any other measure which is taken in order to protect trade. Traditionally, however, it has been anti-dumping and countervailing duties and safeguards that have been considered as falling within the commercial defence instrument term to such a degree that commentators suggested that it covers only those.<sup>46</sup> From the perspective of the multilateral trading system, the WTO Agreement provides certain mechanisms against unfair trade practices such as the Anti-Dumping and SCM Agreements thereby supporting a narrow interpretation of what constitutes a commercial defence instrument.

Assuming that measures other than anti-dumping and countervailing duties may be adopted on the basis of Article 133, it is questionable whether the CCP’s scope could stretch to encompass the content of the Regulation. At a first glance, neither the blocking provision, whereby the EC prohibits the recognition and enforcement of

<sup>42</sup> Case C-300/89, *Commission v. Council (Re Titanium dioxide)* [1991] ECR I-2867; Case 45/86, *Commission v. Council (Re GSP)* [1987] ECR 1493.

<sup>43</sup> Case C-150/94, *United Kingdom v. Council* [1998] ECR I-7235, at para. 53.

<sup>44</sup> J. Bourgeois, “The Common Commercial Policy – Scope and Nature of the Powers”, in E.L.M. Völker (ed.), *Protectionism and the European Community* (Deventer: Kluwer, 1987), p. 12.

<sup>45</sup> The term commercial defence instrument is narrower than unfair trade instrument in the sense that an unfair trade instrument may not only be used in the defence of the Community’s interests but also in the offensive in order to remove barriers to market access that the Community industries are faced with. See C.C. Molyneux, “Establishing the Rules of the Game: Domestic Structures and Unfair Trade Instruments”, in F. Snyder, *Regional and Global Regulation of International Trade* (Oxford, Hart Publishing, 2001), pp. 97–110.

<sup>46</sup> C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford: OUP, 2004), p. 218; M.C.E.J. Bronckers, *WTO Implementation in the European Community—Antidumping, Safeguards and Intellectual Property*, 29 *Journal of World Trade* (1995), p. 73.

judgments by US Courts, nor the clawback provision which enables affected European companies to obtain damages by having recourse to the assets of US companies held in the EC territory, constitute commercial defence measures despite the obvious repercussions their application will have to the operation of the internal market.

The choice of legal basis of the Helms-Burton Regulation, whose provisions this Regulation essentially replicates, was not uncontroversial.<sup>47</sup> In that case, the Helms-Burton Regulation was complemented by a Joint Action under the Common Foreign and Security Policy<sup>48</sup> in order to ensure that the Member States take the necessary measures to protect those natural or legal persons whose interests are affected by the aforementioned laws and actions based thereon, insofar as those interests are not protected by this Regulation.<sup>49</sup> The Regulation itself was based on Articles 57, 133 and 308 EC Treaty.<sup>50</sup> At the choice of legal basis, the Council examined several options but it was clear at the outset that the measures proposed went far beyond the CCP and the use of Article 133 as the sole legal basis was readily dismissed.<sup>51</sup> It was thought that it had broader policy considerations and its main objective was to secure the operation of the common market.<sup>52</sup> The Council also considered its adoption on the basis of Article 301 EC Treaty, which was rejected, as the Helms-Burton Regulation was not aimed at interrupting economic relations with the United States.<sup>53</sup> In the case of the Regulation at issue, Member States in the Council slashed anything stemming from the Helms-Burton Regulation, which had the potential to cause controversy. This included the need for Joint Action under Title V and all other legal bases under the EC Treaty. Some substantive provisions have also fallen victim of this lowest common denominator approach by the Council.

Assuming in the light of the foregoing analysis that Article 133 represents an incorrect legal basis for the adoption of the Regulation and that the ensuing discussion will consider such measures justified in principle, what would the correct legal basis be? Regarding the blocking provision, it should be recalled that in the aftermath of the Treaty of Amsterdam amendments the EC was granted competence in the field of Justice and Home Affairs including the recognition and enforcement of judgments. To this end, the EC adopted Council Regulation 44/2001 (the Brussels Regulation).<sup>54</sup>

<sup>47</sup> J. Huber, *The Helms-Burton Blocking Statute of the European Union*, 20 Fordham International Law Journal (1997), p. 699.

<sup>48</sup> Joint Action 96/668/CFSP of 22 November 1996 adopted by the Council on the basis of Article J.3 and K.3 of the Treaty on European Union concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, O.J. L309, 29.11.1996, p. 7.

<sup>49</sup> Recital (11) of Council Regulation 2271/96.

<sup>50</sup> At the time Articles 73c, 113 and 235 in accordance with the old numbering of EC Treaty Articles.

<sup>51</sup> Huber, as note 47 above, p. 708. This is despite the broad interpretation given to Article 137 by the Court of Justice to include foreign policy, Case C-70/94, *Werner v. Bundesrepublik Deutschland* [1995] ECR I-3189, at para. 10. For a full analysis of the issues, P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford and Portland: Hart Publishing, 2001).

<sup>52</sup> *Ibid.*, p. 713.

<sup>53</sup> *Ibid.*, p. 709.

<sup>54</sup> Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. L12, 16.01.2001, p. 1.

The adoption of the Brussels Regulation lays down common rules internally, in the *AETR* sense,<sup>55</sup> and empowers the EC to act externally in the field occupied by those rules. In fact, the competence granted by these rules is exclusive to the EC as has recently been recognized by the Court of Justice.<sup>56</sup> Since the EC has competence in the field of recognition and enforcement of judgments, and the aim of the blocking provision concerned exactly that, it should have been adopted having Articles 61(c) and 67(1) EC Treaty as its legal basis. These Articles are at a disadvantage compared to Article 133, because they do not serve the interests of effectiveness and uniformity equally well. In particular, they require unanimity in the Council, which may complicate the achievement of an agreement between Member States, the competence over the subject-matter had not been confirmed as exclusive at the time of the adoption of the Regulation and the participation of the European Parliament in the process is also required. Further, issues of the functioning of the internal market would arise, as Denmark is excluded from the application of Title IV EC Treaty.

Regarding the clawback provision, the situation appears equally complicated as, in relation to the preceding analysis, Article 2 of the Regulation could hardly be characterized a commercial policy measure. From an EC perspective, in order to determine the legal basis for the clawback provision it is imperative to determine the nature of the rights created by the Regulation. It is unclear whether the right created is a right in tort or a right conferred by public law and, consequently, it is also unclear whether the issue falls within the ambit of “jurisdiction and enforcement in civil and commercial matters”.<sup>57</sup> The Helms-Burton Regulation provided that recovery could be obtained from the natural or legal person or any other entity causing damages or from any person acting on its behalf or intermediary and determined the Brussels Convention as applicable.<sup>58</sup> The Regulation, however, provides that:

“Recovery may be obtained from the natural or legal person or any other entity related to that person or entity. Persons or entities shall be deemed to be related if: (a) they are officers or directors of one another’s businesses; (b) they are legally recognized partners in business; (c) one of them controls directly or indirectly the other; (d) both of them are directly or indirectly controlled by a third person.”<sup>59</sup>

without reference to the application of the Brussels Regulation. The Brussels Regulation will provide the applicable rules on jurisdiction if the right created by the Regulation fits within the “civil and commercial matters” classification which means that even if the respondent is not domiciled in any Member State then the Brussels Regulation will apply.<sup>60</sup> Courts of the Member States would assume jurisdiction under

<sup>55</sup> Case 22/70, *Commission v. Council (Re AETR)* [1971] ECR 263.

<sup>56</sup> Opinion 1/03, (*Re Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*) [2006] ECR I-1145.

<sup>57</sup> It has been suggested that the legal cause of the corresponding provisions in Japanese legislation is either tort or unjust enrichment. See Matsushita and Iino, as note 12 above, at p. 770.

<sup>58</sup> Article 6 of the Helms-Burton Regulation.

<sup>59</sup> Article 2(3) of the Regulation.

<sup>60</sup> Case C-281/02, *Owusu* [2005] ECR I-1383. This judgment should be considered to render the lethal blow on the application of traditional rules of jurisdiction and note the end of the *forum non conveniens* doctrine.

the provisions of the Brussels Regulation and the same rules would apply for the recognition and enforcement of the judgments rendered to all other Member States where assets of the respondent US companies could be located. The question whether the clawback provision is covered by the Brussels Regulation is inconclusive but, guided by the Helms-Burton Regulation, it can be argued that Articles 61(c) and 67(1) provide appropriate legal bases. In the alternative, bearing in mind that the clawback provision clearly affects the operation of the common market, as with the Helms-Burton Regulation, Article 308 EC should be added as a legal basis.<sup>61</sup>

#### B. CONTENT

Generally, the measures adopted under the Regulation run counter to the objectives of the CCP which are the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.<sup>62</sup> More specifically, the content of the Regulation raises two additional problems in EC law, that of the extraterritorial reach of its provisions and the creation of rights for private parties with unwarranted basis on either WTO or EC law.

Concerning extraterritoriality, and, in particular, regarding the blocking provision, it must be stated that while there is no obligation incumbent on the Member States to recognize judgments rendered by US Courts, this is common practice on grounds of international comity. The Brussels Regulation provides for exceptions to the recognition and enforcement of judgments rendered by the courts of the Member States on grounds of public policy,<sup>63</sup> yet the concept does not have a uniform interpretation in different Member States. Assuming that what the Regulation does is to harmonize the concept of public policy there are two possible side effects. Assuming that the EC has the competence to harmonize the principle of public policy, in so far as it concerns the recognition and enforcement of foreign judgments, this harmonization should only take place under the appropriate legal bases, Articles 61(c) and 67(1) EC Treaty. The public policy concept, which justifies the non-enforcement of foreign judgments on the ground that the foreign Court applied WTO-inconsistent rules, is a step too far and should be resisted.<sup>64</sup>

In addition, the clawback provision makes the extraterritorial reach of the Regulation more controversial in that it not only forbids the recognition and enforcement of judgments rendered by the courts of another WTO Member but, further, grants a right of compensation to affected industries when these judgments impose financial penalties or fines. This, apart from *de facto* ousting the jurisdiction of the US Courts to apply their laws, pre-empts their jurisdiction to hear claims for damages suffered by the EC companies. The relationship between the courts of the

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<sup>61</sup> Huber, as note 47 above, at pp. 711–712.

<sup>62</sup> Article 131 EC Treaty.

<sup>63</sup> Article 34 of the Brussels Regulation.

<sup>64</sup> Along similar lines, Matsushita and Iino, as note 12 above, at pp. 775–776.

Member States and the US courts then becomes problematic as can be seen in the context of anti-trust litigation. For example, in the famous *Laker Airways* litigation, in Laker's appeal in the House of Lords against a decision based on the 1980 Protection of Trading Interests Act, whose terms the Regulation mirrors, the House of Lords held that English Courts had no power to block the exercise of judicial power by the US courts as long as the US Courts had jurisdiction.<sup>65</sup>

The creation of rights for individuals is equally problematic with regard to the direct effect of WTO law. As is well known, the Court of Justice has consistently held that WTO rules are not capable of conferring rights on individuals.<sup>66</sup> The same applies to the US legal order. Bearing in mind that the breach of WTO rules is the cause of the EC action, the Regulation establishes an, otherwise non-existent, link between WTO rules and individuals' rights. In connection with the discussion on extraterritoriality, the Council creates WTO-based rights in a foreign legal order at the same time as it denies those rights in the EC legal order.<sup>67</sup>

Suppose that WTO rules confer rights on individuals, what are the rights in this case? EC companies can recover the fines imposed, the litigation costs and the amount of any settlement. The latter two relate to the future in the absence of any cases in which fines were actually imposed against EC companies or any case that has settled. Regarding the claim for litigation costs, the request to be calculated at the determination of the level of nullification or impairment has been declined by the arbitrator who issued his Report three months after the adoption of the Regulation.<sup>68</sup> Assuming, contrary to the arbitrator's report, that the Regulation validly establishes a right for the recovery of any litigation costs suffered by EC companies, this should be limited to damages after 31 December 2001 when the reasonable period for implementation has expired. This is not only so in WTO law<sup>69</sup> but also recognized by the European Court of Justice in EC law.<sup>70</sup>

### C. CONTEXT

Moving on to the examination of the measure in its context, it should be pointed out that the Regulation was adopted in the course of a WTO dispute initiated under the Trade Barriers Regulation (TBR), the commercial policy instrument specifically

<sup>65</sup> *British Airways v. Laker Airways* [1984] 3 WLR 413.

<sup>66</sup> Case C-149/96, *Portugal v. Council* [1999] ECR I-8395; Case C-377/02, *Léon Van Parys NV v. Belgisch Interventie-en Restitutiebureau (BIRB)* [2005] ECR I-1465. For a comprehensive analysis, see A. Antoniadis, *The European Union and WTO law: a nexus of reactive, coactive and proactive approaches*, 6 World Trade Review, (2007), p. 45.

<sup>67</sup> See the preamble of Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994), O.J. L336, 23.12.1994, p. 1.

<sup>68</sup> WT/DS136/ARB, *US—1916 Anti-Dumping Act of 1916*, Decision by the Arbitrators at paras 5.76–5.78.

<sup>69</sup> Article 21.3 (c) DSU.

<sup>70</sup> Case C-93/02, *Biret International SA v. Council*, and Case C-94/02 *Établissements Biret et Cie. v. Council*, [2003] ECR I-10497, at paras 61–65.

promulgated in order to allow the EC to avail itself of the provisions of the multilateral trading system and in particular, the WTO DSU.<sup>71</sup> It is designed to exert the EC's rights and to remove the barriers to trade set by other WTO Members. In fact, the *US—1916 Anti-Dumping Act* dispute has been initiated on the basis of a complaint brought by EUROFER, a company subject to proceedings in US Courts under the Act.<sup>72</sup>

The examination of the context in which the Regulation was adopted offers an additional perspective for the scrutiny of the Regulation. First, the context may be a factor determinative for the choice of the legal basis. Second, the context sets the procedural parameters that the Regulation needs to observe. Third, it opens a gateway necessitating the scrutiny of the Regulation's provisions against the multilateral trading rules.

The Court held in *Opinion 2/00*, a question concerning whether Articles 133 and 174(4) constituted the appropriate legal basis for the conclusion of the Cartagena Biosafety Protocol: "... the Protocol is, in the light of its context, its aim and its content, an instrument intended essentially to improve biosafety and not to promote, facilitate or govern trade".<sup>73</sup>

The context is a novel factor for the determination of the legal basis of a measure. Since the context within which the Regulation has been adopted is the WTO DSU externally and the TBR internally, it offers significant support to justify the choice of Article 133 as the legal basis for the Regulation. However, because of the content of the measure analysed above, it is unlikely that the context of the TBR sufficiently tilts the balance in favour of Article 133 as the correct legal basis.

The soundness of this proposition should be examined in the light of an analysis of the relevant provisions of the TBR. Article 1 TBR provides:

"This Regulation establishes Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization which, *subject to compliance with existing international obligations and procedures*,<sup>74</sup> are aimed at:

- (a) responding to obstacles to trade that have an effect on the market of the Community, with a view to removing the injury resulting therefrom;
- (b) responding to obstacles to trade that have an effect on the market of a third country, with a view to removing the adverse trade effects resulting therefrom.

These procedures shall be applied in particular to the initiation and subsequent conduct and termination of international dispute settlement procedures in the area of common commercial policy."

<sup>71</sup> This should be examined in the light of the fact that the TBR is the successor of the New Commercial Policy Instrument, which was adopted in response to commentators urging the Community to take action in order to counteract US boycott against EU companies working on the Siberian gas pipeline.

<sup>72</sup> See Notice of initiation of an examination procedure concerning an obstacle to trade within the meaning of Council Regulation No 3286/94 – Failure of the United States of America to repeal the Antidumping Act of 1916, O.J. C58, 25.2.1997, p. 14.

<sup>73</sup> *Opinion 2/00 (Re Cartagena Protocol)* [2001] ECR I-9713, at para. 37.

<sup>74</sup> Emphasis added.

Accordingly, when faced with barriers to market access abroad the EC must follow the procedures enshrined in the TBR at the exercise of its international trade rights but “subject to compliance with existing obligations and procedures”. This entails both a procedural and a substantive obligation for the EC. While the adoption of the TBR is without prejudice to the right of the Commission to initiate WTO proceedings under the traditional procedure of Article 133, it should nonetheless be submitted that when the EC initiates a dispute under the TBR the WTO it is bound to follow the procedural rules contained therein. Second, in its conduct, it is necessary to observe its obligations under the WTO DSU.

In order to conform to these requirements, Article 12 TBR, entitled “Adoption of commercial policy measures”, provides:

- “1. Where it is found (as a result of the examination procedure, unless the factual and legal situation is such that an examination procedure may not be required) that action is necessary in the interests of the Community in order to ensure the exercise of the Community’s rights under international trade rules, with a view to removing the injury or the adverse trade effects resulting from obstacles to trade adopted or maintained by third countries, the appropriate measures shall be determined in accordance with the procedure set out in Article 13.
2. Where the Community’s international obligations require the prior discharge of an international procedure for consultation or for the settlement of disputes, the measures referred to in paragraph 3 shall only be decided on after that procedure has been terminated, and taking account of the results of the procedure. In particular, where the Community has requested an international dispute settlement body to indicate and authorize the measures which are appropriate for the implementation of the results of an international dispute settlement procedure, *the Community commercial policy measures which may be needed in consequence of such authorization shall be in accordance with the recommendation of such international dispute settlement body.*
3. Any commercial policy measures may be taken which are compatible with existing international obligations and procedures, *notably*:<sup>75</sup>
  - (a) suspension or withdrawal of any concession resulting from commercial policy negotiations;
  - (b) the raising of existing customs duties or the introduction of any other charge on imports;
  - (c) the introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.
4. The corresponding decisions shall state the reasons on which they are based and shall be published in the Official Journal of the European Communities. Publication shall also be deemed to constitute notification to the countries and parties primarily concerned.”

It follows from Article 12 TBR that the measures the EC may adopt in response to illicit commercial practices abroad are those specified in paragraph 3 namely, the suspension or withdrawal of concessions, the raising of customs duties or the introduction of quantitative restrictions. In the light of the WTO jurisprudence in the field, “notably” must be interpreted as exclusively.<sup>76</sup> In addition, those can be taken

<sup>75</sup> Emphasis added.

<sup>76</sup> WT/DS152 US—Sections 301–310 of the Trade Act of 1974, and, most notably, WT/DS136 US—1916 Anti-Dumping Act of 1916. See below.



only after the discharge of international dispute settlement procedures and in accordance with the recommendations of the Dispute Settlement Body. When an international dispute settlement procedure has not been invoked and action in the interest of the EC should prove necessary, then the EC is bound by the TBR with regard to the measures it is entitled to adopt which only include the right to suspend or withdraw concessions, raise tariffs or impose quotas.<sup>77</sup> The substantive legal obligation should be considered as binding on the EC irrespective of the route chosen for the initiation of the dispute. In this case, even if the dispute was initiated under the Article 133 EC Treaty route, the substantive legal obligations contained in the TBR should still be binding on the EC. The adoption of the Regulation therefore, is in violation of the TBR *prima facie* since it is not included in the list consistent with the TBR actions that can be taken in the context of a WTO dispute.

In addition, the duty to provide reasons enshrined in Article 12(4) TBR is a restatement of the general duty enshrined in Article 253 EC Treaty. The reasons provided in the preamble to the Regulation are the EC interests towards the harmonious development of world trade,<sup>78</sup> the protection of persons under the jurisdiction of the Member States against substantial litigation costs and the possibility of a judgment awarding treble damages,<sup>79</sup> the established legal order and the interests of natural and legal persons exercising rights under the Treaty,<sup>80</sup> and the need to protect the interests of natural and legal persons under the jurisdiction of the Member States.<sup>81</sup> It should be stated that behind the grandiose language used in the preamble it is difficult to identify the reasons, whilst a retaliation procedure is pending under the WTO DSU, for the adoption of the measures. Neither the rights of the EC industry can be identified especially since no judgment on the basis of the Act has been rendered in the US Courts against EC companies.<sup>82</sup> Neither is, it can be argued, in the Community interest, as required by the TBR's preamble, to take these measures.

Finally, since the TBR makes reference to WTO law the compatibility of the Regulation with WTO law will determine the Regulations legality in EC law. This essentially means that, in accordance with the case-law of the Court of Justice on the matter,<sup>83</sup> when the EC takes a measure under the TBR which makes clear reference to the multilateral trading rules, the measure will be deemed in violation of EC law if it is found inconsistent with the multilateral trading rules to which it refers. According to *Fediol*, the WTO norms will become the standard of review in the present case.<sup>84</sup> This is the so-called clear reference exception which makes the legality of the Regulation in

<sup>77</sup> Article 13(3) TBR.

<sup>78</sup> Recital (1).

<sup>79</sup> Recitals (6) and (7).

<sup>80</sup> Recital (8).

<sup>81</sup> Recital (9).

<sup>82</sup> With the exception of a general chilling effect. See Matsushita and Iino, as note 12 above, at p. 753.

<sup>83</sup> Case C-149/96, *Portugal v. Council* [1999] ECR I-8395.

<sup>84</sup> Case 70/87, *Fediol v. Commission* [1989] ECR 1825. For a full analysis, see F. Snyder, *The Gatekeepers: The European Courts and WTO Law*, 40 Common Market Law Review (2003), p. 313.

EC law dependent on its legality in WTO law. For this additional purpose, the analysis of the Regulation's conformity with WTO law follows.

## V. ANALYSIS OF THE REGULATION'S LEGALITY IN WTO

Customary international law rules provide, in principle, the possibility for retorsion or reprisals under certain conditions.<sup>85</sup> When international agreements however provide for binding international adjudication and the parties to the agreements have submitted to peaceful means of dispute settlement such autonomous measures should be excluded. During the GATT era, the existence of several avenues for the settlement of disputes has been construed to exclude resort to unilateral retorsion.<sup>86</sup>

With the advent of the DSU this argument became stronger. Article 23, entitled "Strengthening the multilateral system", states

- "1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.
2. In such cases, Members shall:
  - (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;
  - (b) follow the procedures set forth in Article 21 to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and
  - (c) follow the procedures set forth in Article 22 to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time."

Given that the measures enshrined in the Regulation do not involve the suspension of concessions or obligations under the WTO Agreement, it may be argued that they escape scrutiny under the rules of the DSU.<sup>87</sup> The determination of whether the provisions of the Regulation fall within the scope of Article 23 is fundamental in this respect. The issue has been examined in several Panel Reports in different contexts.

<sup>85</sup> N.D. White and A. Abass, "Countermeasures and Sanctions", in M.D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003), p. 505.

<sup>86</sup> E.-U. Petersmann, "The EEC as a GATT Member – Legal Conflicts between GATT Law and European Community Law", in M. Hilf, F.G. Jacobs and E.-U. Petersmann (eds), *The European Community and GATT*, (Deventer: Kluwer Law and Taxation, 1989), p. 46.

<sup>87</sup> Matsushita and Iino, as note 12 above, at p. 767.

In *US—Section 301*,<sup>88</sup> the EC brought this dispute against the US equivalent to the TBR complaining that the authority granted to the United States Trade Representative to determine the WTO-inconsistency of a measure taken by another WTO Member in the absence of a Panel or Appellate Body Report on the matter and to take further action in the case of non-compliance with DSB recommendations violated Article 23.2(a) and Article 23.2(c) respectively.<sup>89</sup> The Panel recognized that there is a dual obligation Article 23 DSU imposes on WTO Members: first, to have recourse to the DSU when they seek to redress a WTO inconsistency and second, when doing so to abide by the provisions of the DSU.<sup>90</sup> Sections 301–310 were analysed by the Panel in the abstract without references to specific instances of their application.<sup>91</sup> In this respect, the Regulation should be distinguished in that, although based on the TBR, it mandates measures other than those provided in Article 23.3(c). Despite this the Panel's dicta are revealing. In particular, the Panel made clear that the prohibitions mentioned in Article 23.2 are only examples of conduct which contradict the rules and procedures of the DSU and that these rules and procedures clearly cover much more than the ones specifically mentioned in Article 23.2.<sup>92</sup>

Unilateral action undertaken by the United States has been the object of the *US—Imports of Certain EC Products*. In parallel with the Panel process under Articles 21.5 and 22.6 DSU to determine the conformity with the DSB recommendations of the EC legislation amending the Common Market Organization in Bananas and to grant authorization to the United States to retaliate against products originating in the EC, the United States imposed additional tariffs on the targeted EC products and applied them with retroactive effect. The EC immediately requested the establishment of a Panel to assess whether this was a breach of WTO law.<sup>93</sup> The Panel held that:

“First, no WTO violation can justify a unilateral retaliatory measure by another Member; this is the object of the prohibitions contained in Article 23.1 of the DSU. If Members disagree as to whether a WTO violation has occurred, the only remedy available is to initiate a DSU/WTO dispute process and obtain a WTO determination that such a WTO violation has occurred. Secondly, as noted by the Panel in *US—Section 301*, most of the time-limits in the DSU are either minimum time-limits without ceilings or maximum time-limits that are, nonetheless, indicative only. ... Delays in dispute settlement procedures can always happen. The fundamental obligation of Article 23 of the DSU would be a farce if every time there is a delay in a panel or arbitration process, the unsatisfied Member could simply unilaterally determine that a violation has occurred and unilaterally impose any remedy. We reject, therefore, this US defence.”<sup>94</sup>

<sup>88</sup> WT/DS152, *US—Sections 301–310 of the Trade Act of 1974 (complaint brought by the European Communities)*.

<sup>89</sup> *Ibid.*, at paras 3.1(a) and 3.1(b).

<sup>90</sup> *Ibid.*, at para. 7.43.

<sup>91</sup> *Ibid.*, at para. 7.40.

<sup>92</sup> *Ibid.*, at para. 7.45.

<sup>93</sup> WT/DS165, *United States—Import Measures on Certain Products from the European Communities (complaint brought by the European Communities)*.

<sup>94</sup> WT/DS165, *United States—Import Measures on Certain Products from the European Communities*, Panel Report, para. 6.135 (emphasis in the original).

The Appellate Body reversed this finding on the procedural ground that such a determination escaped the Panel's terms of reference but it confirmed the fact that Article 23 DSU concerns the prohibition of unilateral action.<sup>95</sup>

Any shreds of doubt as to whether the measures under the Regulation fall within the scope of Article 23 were dismissed in the recent *EC—Trade in Commercial Vessels*,<sup>96</sup> in which Korea complained over the EC's Temporary Defensive Mechanism for Shipbuilding (TDM Regulation).<sup>97</sup> The TDM Regulation rendered aid granted in support of contracts for the building of container ships, product and chemical tankers as well as LNG carriers compatible with the common market when there has been competition for the contract from a Korean shipyard offering a lower price.<sup>98</sup> The TDM Regulation could only apply after the EC had initiated proceedings in the WTO against Korea and until the dispute was resolved.<sup>99</sup> There are important differences differentiating the TDM Regulation from the Regulation at issue. Crucially, however, the Panel was given the opportunity to analyse the legality of unilateral self-help measures, other than suspension of concessions or other obligations, as was the case in *US—Section 301* and *US—Certain Import Measures*, under Article 23 DSU. The Panel made extensive reference to the disputes analysed above and held that a WTO Member will be in violation of Article 23.1 when it acts unilaterally in order to seek to obtain the results that can be achieved through the remedies of the DSU and will accordingly violate Article 23.1 when it adopts remedies other than those that are consistent with Article 23.2.<sup>100</sup> In the Panel's view, any unilateral attempt to obtain the result of removal of a WTO-inconsistent measure would be a violation of Article 23.1 DSU.<sup>101</sup>

On the basis of the jurisprudence so far, it must be concluded that Article 23 only permits the suspension or withdrawal of concessions as countermeasures for the violation of the WTO Agreement subject to prior authorization by the DSB. This interpretation necessitates the finding that both the blocking and the clawback provisions of the Regulation violate Article 23 DSU.

The clawback provision deserves scrutiny under the Subsidies and Countervailing Measures (SCM) Agreement too. In accordance with the Continued Dumping and Subsidy Offset Act (Byrd Amendment) anti-dumping and countervailing duties were to be distributed to the affected domestic producers for qualifying expenditure on an annual basis.<sup>102</sup> According to its terms, as "affected domestic producer" qualifies a company that was a petitioner or interested party in support of the petition with respect

<sup>95</sup> WT/DS165/AB/R, *United States—Import Measures on Certain Products from the European Communities*, Appellate Body Report, para. 111.

<sup>96</sup> WT/DS301/R, *European Communities—Measures Affecting Trade in Commercial Vessels*.

<sup>97</sup> Council Regulation 1177/2002 of 27 June 2002 concerning a temporary defence mechanism to shipbuilding, O.J. L172, 2.7.2002, p. 1.

<sup>98</sup> Article 2 TDM Regulation.

<sup>99</sup> Article 4 TDM Regulation.

<sup>100</sup> WT/DS301/R, *European Communities—Measures Affecting Trade in Commercial Vessels*, Panel Report, paras 7.195, 7.201, 7.205 and 7.207.

<sup>101</sup> *Ibid.*, at para. 7.196.

<sup>102</sup> Enacted as part of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies appropriations Act, 2001, Public Law 106-387, 114 Stat. 1549, 28 October 2000, sections 1001–1003.

to which an anti-dumping duty or a countervailing duty order and as “qualifying expenditure” the expenditure[s] incurred after the issuance of the anti-dumping duty finding or order or countervailing duty order has been entered.<sup>103</sup> It was established by the Panel and Appellate Body that the Byrd Amendment constitutes a non-permissible specific action against dumping or a subsidy, contrary to Articles VI:2 and VI:3 of the GATT 1994, Articles 18.1 and 18.4 of the Anti-Dumping Agreement, Articles 32.1 and 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.<sup>104</sup> There are certain parallels that can be drawn between the Byrd Amendment and the Regulation. Importantly, the reason for their adoption is to reimburse private parties whose interests have been affected by illicit commercial practices and the extent of the granted reimbursement usually exceeds the core of the damage suffered from those practices to include very broadly framed “qualifying expenditure” and legal expenses respectively. The difference is that while the Byrd Amendment was a measure taken against dumping and subsidies, the clawback provision could be deemed as an actionable subsidy itself within the meaning of the SCM Agreement. This, of course, would have to stretch the interpretative limits of Article 1 SCM but should not be *a priori* excluded.

The assertion that the Regulation violates Article 23 DSU remains the stronger argument. Be that as it may, can the measures adopted under the Regulation be justified as legitimate countermeasures from the point of view of general public international law?<sup>105</sup> Article 60 of the Vienna Convention on the Law of the Treaties permits the suspension of a treaty if the other party fails to respect an essential element to the object and purpose of the Treaty. In this case it is doubtful whether the US non-compliance with the DSB rulings regarding the Act qualifies as an essential violation of the WTO Agreement. Further, the existence of the WTO dispute settlement system operates as *lex specialis* and any authorization for the suspension of treaty obligations should stem from the DSB.<sup>106</sup> In the same vein, according to Article 52(3)(b) of the ILC Draft Articles on State Responsibility: “Countermeasures may not be taken and if already taken must be suspended without undue delay if: . . . the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties”. There is a question here on whether the dispute is pending between the EU and the

<sup>103</sup> WT/DS217/R, *United States—Continued Dumping and Subsidy Offset Act of 2000* (complaint by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, Thailand), Panel Report, paras 2.1–2.7.

<sup>104</sup> WT/DS217/AB/R, *United States—Continued Dumping and Subsidy Offset Act of 2000* (complaint by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, Thailand), Appellate Body Report; WT/DS217/R *United States—Continued Dumping and Subsidy Offset Act of 2000* (complaint by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, Thailand), Panel Report.

<sup>105</sup> R. Lefebvre, *Frontiers of International Law: Counteracting the Exercise of Extraterritorial Jurisdiction*, 10 *Leiden Journal of International Law* (1997), pp. 4–6.

<sup>106</sup> E. Paasivirta and A. Rosas, “Sanctions, Countermeasures and Related Actions in the External Relations of the EU: A Search for Legal Frameworks”, in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Deventer: Kluwer Law International, 2002), p. 215; WT/DS165/R, *United States—Import Measures on Certain Products from the European Communities*, Panel Report, para. 6.133. Curiously, the EC attempted to use the same argument to the opposite effect in *European Communities—Measures Affecting Trade in Commercial Vessels*, Panel Report, para. 7.204.

United States. It could be argued that after the DSB delivered its recommendations the case is not pending any more before the tribunal. The Draft Articles provision however should be given a broad temporal interpretation. The request for the suspension of concessions or other obligations is an integral part of the dispute settlement mechanism established under the DSU and any authorization granted is temporary pending full implementation of the DSB recommendations. Therefore the fact that there was a request submitted to the Arbitrators under Article 22.6 DSU on 19 September 2003 and three months later, on 15 December 2003 the EC adopted the countermeasures does not lend support to the EC argument in international law.

Contrary to what has been recently advocated,<sup>107</sup> it is difficult to argue in favour of the Regulation's conformity with WTO law and, in particular, Article 23 DSU. In its proper construction, Article 23 contains a broad prohibition of unilateralism which excludes all measures outside those prescribed in the DSU. As Weiss puts it, "The use of or threat of concurrent unilateral self-help approaches under domestic legislation, . . . , is also likely to call in question their legal obligation to proceed in good faith."<sup>108</sup> Weiss goes on to explain that, "unilateral action . . . is the very antithesis of the WTO's multilateral dispute settlement system".<sup>109</sup> While the former is based on domestic policy considerations, is subject to the dealings on the internal political and economic agenda, is unpredictable and determined by the interests of domestic influential groups with no regard to the international legal obligations, the WTO dispute settlement is rooted in multilateralism, predictability and security in the multilateral trading system.

In conclusion, it is clear that the Regulation violates Article 23 DSU and consequently, as analysed above, the TBR. The United States attempted to challenge the Regulation in the course of the Article 22.6 Arbitration on different grounds.<sup>110</sup> They claimed that the existence of the Regulation reveals that litigation costs are excluded from the amount of nullification or impairment suffered by the EC and that any amount of nullification or impairment awarded to the EC under that arbitration should be reduced by the amount the Regulation reduces nullification or impairment.<sup>111</sup> The Arbitrators decided that the Regulation fell outside the Panel's terms of reference and invited the United States to have recourse to the appropriate dispute settlement procedures if the Regulation results in a situation where the suspension of the obligations exceeds the level of nullification or impairment.<sup>112</sup> The Regulation remains unchallenged to date in WTO dispute settlement while the time-limit for its challenge in EC Courts has long elapsed.

<sup>107</sup> Matsushita and Iino, as note 12 above, at p. 768.

<sup>108</sup> F. Weiss, "Manifestly Illegal Import Restrictions and Non-compliance with WTO Dispute Settlement Rulings: Lessons from the Banana Dispute", in E.-U. Petersmann and M. Pollack (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (Oxford: Oxford University Press, 2003), p. 134.

<sup>109</sup> *Ibid.*, at p. 135.

<sup>110</sup> WT/DS136/ARB, *US—1916 Anti-Dumping Act of 1916*, Decision by the Arbitrators, paras 3.16–3.20.

<sup>111</sup> *Ibid.*, at para. 3.17.

<sup>112</sup> *Ibid.*, at paras 3.19–3.20.

## VI. CONCLUSIONS

In conclusion, it must be argued that the Regulation transgresses the boundaries of legality, internal and external, drawn by the EC and WTO rules. With regard to the former, the adoption of the Regulation takes a maximalistic understanding of the CCP and sets it as the general external economic relations policy. It is clear from the history of the tormented provision of Article 133 EC Treaty, that neither the Court<sup>113</sup> nor the Member States as authors of the EC Treaty<sup>114</sup> condoned the use of the CCP as an all-inclusive external economic relations policy and the *ad hoc* exception in this case does not represent a shift in direction. At the same time, a challenge in the WTO dispute settlement system would, in all probability, be upheld. The argument this study makes is that the Regulation exceeds both internal and external boundaries of the CCP, it constitutes an anomaly within the EC legal order and is susceptible to a challenge in the WTO dispute settlement system.

The formal legality of the Regulation regardless, the advisability of the adoption of those measures is equally questionable. Even if the claims of the EC industries are perfectly valid, the balance tips towards the non-adoption of those kind of measures. First, they sit uncomfortably with basic norms of the multilateral trading system and generally speaking, international law. They are tainted with extraterritoriality, they grant rights to European companies unfounded in law and they open the EC to criticism. This is particularly so because of the timing, content and context of the measures. Since a WTO dispute had been initiated by the EC in the course of which the EC was authorized to suspend obligations under the covered agreements, the EC should not resort to unilateral action. This unilateral action undermines the procedure, its claim for nullification and impairment of benefits and its credibility within the multilateral trading system.

Can the EC afford leaving EU companies competing in the US and other markets without any protection from WTO-incompatible legislation? This invites a look at the intrinsic characteristics of the system and the public international law nature, which excludes the immediate involvement of individuals.<sup>115</sup> The WTO system is certainly imperfect but one should not dismiss its usefulness as a mechanism to coerce even the strongest political and economic players such as the United States to comply with its norms.<sup>116</sup> It also facilitates the creation of a level playing field. After all, it is clear that

<sup>113</sup> Opinion 1/94, (*Re WTO*) [1994] ECR I-5267.

<sup>114</sup> Particularly in the Maastricht Intergovernmental Conference where the proposal tabled by the Irish Presidency to transform the CCP into a general external economic policy was rejected. For more, see M. Maresceau, "The Concept of 'Common Commercial Policy' and the Difficult Road to Maastricht", in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension* (Dordrecht: Martinus Nijhoff, 1993), pp. 3–19. Also, the outcome of the Treaty of Nice negotiations gives helpful insights into the Member States position on the matter.

<sup>115</sup> J.P. Trachtman and P.M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right is it Anyway?*, 44 *Harvard International Law Journal* (2003), p. 221; J.P. Trachtman, "Private Parties in EC–US Dispute Settlement at the WTO: Toward Intermediated Domestic Effect", in E.-U. Petersmann and M. Pollack, *Transatlantic Economic Disputes: The EU, the US, and the WTO* (Oxford: Oxford University Press, 2003), p. 527.

<sup>116</sup> The repeal of the 1916 Anti-Dumping Act by virtue of Section 2006 of the Miscellaneous Trade and Technical Corrections Act of 2004 offers ample evidence to this effect.

since the expiry of the deadline for implementation with the Panel and the Appellate Body rulings in *US—1916 Anti-Dumping Act* no treble damages have been imposed against any European companies.<sup>117</sup> Once the EC has submitted itself to the WTO dispute settlement it should allow the protection of competitive opportunities that the system is designed to safeguard. The rights of the private parties should be exhausted at the possibility of judicial review of the Commission Decision to initiate proceedings under the TBR.<sup>118</sup>

Regarding a normative framework for the adoption of autonomous measures, this may indeed be necessary in the EC's quiver for various reasons.<sup>119</sup> This legislation should only be invoked in exceptional circumstances, like the Helms-Burton Act, and not abused in the context of an ordinary trade dispute stemming from the one party's illicit commercial practices. In addition, its application must be mutually exclusive with the TBR. One must, however, be very careful with this proposal. The establishment of the WTO readily endowed the EC with a system to challenge unfair trading practices of WTO Members. The availability of autonomous measures and remedies might tempt the EC to coerce compliance by recourse to unilateral action instead of using the multilateral mechanism established under the WTO DSU. Out of the blue, the WTO dispute settlement system, which is celebrated for its rigour, might look as the second best alternative. In the past couple of years, EC practice confirms this hypothesis<sup>120</sup> and it is only to be hoped that the EC will continue having resort to the broadly successful system of dispute settlement under the WTO DSU instead of taking an anachronistic recourse to unilateralism.

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<sup>117</sup> WT/DS136/ARB, *US—1916 Anti-Dumping Act*, Decision of the Arbitrators, para. 6.5.

<sup>118</sup> Case 70/87, *Fediol v. Commission* [1989] ECR 1825.

<sup>119</sup> WT/DS152/R, *US—Sections 301–310 of the Trade Act of 1974*, Panel Report, para. 7.63.

<sup>120</sup> Council Regulation 1177/2002 of 27 June 2002 concerning a temporary defence mechanism to shipbuilding, O.J. L172, 2.7.2002, p. 1; Regulation 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidization and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community, O.J. L162, 30.4.2004, p. 1.